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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

19 *IN RE: ZOOM VIDEO COMMUNICATIONS*
20 *INC. PRIVACY LITIGATION.*

Master Case No. 3:20-cv-02155-LB

31 This Document Relates To:

All Actions

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO OBJECTORS'
MOTION FOR AWARD OF
ATTORNEYS' FEES AND INCENTIVE
AWARDS**

Judge: Hon. Laurel Beeler
Courtroom: B-15th floor
Date: February 2, 2023
Time: 9:30 a.m.

TABLE OF CONTENTS

		Page
1	I. Introduction.....	1
2	II. Procedural Background.....	2
3	A. Settlement and Positive Class Reaction	2
4	B. Rogers/Neace and Cohen Assert Extensive Objections, All Rejected by the Court.	2
5	C. Rogers/Neace and Cohen Appeal, Then Agree to Settlements Providing <i>Limited</i>	
6	Benefits to the Settlement Class.....	3
7	III. Argument	4
8	A. Legal Standard	4
9	B. Application.....	6
10	IV. Conclusion	7
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

2		Page(s)
3	Cases	
4	<i>Fraley v. Facebook, Inc.</i>	
5	No. C 11-1726 RS, 2014 WL 806072 (N.D. Cal. Feb. 27, 2014).....	5
6	<i>In re HP Inkjet Printer Litig.</i>	
7	No. 5:05-CV-3580 JF, 2011 WL 2462475 (N.D. Cal. June 20, 2011)	4
8	<i>Rodriquez v. Disner</i>	
9	688 F.3d 645 (9th Cir. 2012).....	4, 5
10	<i>In re Bluetooth</i>	
11	654 F.3d 935, 942 (9th Cir. 2011).....	5
12	<i>In re Transpacific Passenger Air Transp. Antitrust Litig.</i>	
13	No. C-07-05634 CRB, 2015 WL 4776946 (N.D.Cal. Aug. 13, 2015)	5
14	<i>Vizcaino v. Microsoft Corp.</i>	
15	290 F.3d 1043(2002).....	1, 4
16	<i>Wininger v. SI Mgmt. L.P.</i>	
17	301 F.3d 1115 (9th Cir. 2002).....	5
18	Other Authorities	
19	Fed. R. Civ. P. 23(e)(5)(B)(i).....	4

1 **I. INTRODUCTION**

2 An award of attorneys' fees requires "a showing that objectors *substantially enhanced* the
 3 benefits to the class under the settlement" and, in the absence of such a showing, objectors are not
 4 entitled to fees "as a matter of law." *Vizcaino v. Microsoft Corp.* 290 F.3d 1043, 1052 (2002)
 5 (emphasis added).

6 Here, Objectors Sammy Rodgers and Alvery Neace ("Rodgers/Neace") and Judith Cohen
 7 ("Cohen") (collectively, "Objectors") reached settlements providing limited benefits to the
 8 Settlement Class that impacted the fringes of the Class Settlement Agreement. At the same time,
 9 Objectors effectively delayed distribution of settlement funds to millions of Class Members.
 10 Nonetheless, they now ask the Court to approve fees representing *100% of their lodestar*,
 11 notwithstanding the fact that (1) the Court overruled their objections in their entirety, (2) they
 12 abandoned their primary objections and agreed to settlements providing narrow, non-monetary
 13 benefits to the Class, and (3) rather than submit detailed records segregating the hours reasonably
 14 spent to obtain such relief, they included *all* their time on this case (including time spent on their
 15 fee motions). The Court should reject such gross overreaching and deny the request for attorneys'
 16 fees.

17 Objectors had ample guidance on the applicable standard and the need for a sufficient
 18 record. In the Court's Order Granting Motion for Indicative Ruling ("Indicative Order"), deferring
 19 the issue of attorneys' fees, the Court explicitly cited *Vizcaino*'s standard that fees be tied to a
 20 substantial enhancement of benefits, not merely the total time spent on the case. Dkt. at 5. The
 21 Court also noted that Objectors, as the moving parties, had the burden to submit "detailed time
 22 records" justifying the time spent to obtain these benefits. *Id.* The motions do not follow this
 23 guidance. Just because the settlements provide that an award will be paid from fees previously
 24 awarded to Lead Counsel, who spent years pursuing difficult claims and obtained one of the largest
 25 privacy settlements in United States history, there is no excuse for Objectors' windfall request for
 26 fees pursuing dubious objections, obtaining limited benefits, and delaying distributions to millions
 27 of Class Members. The motions should be denied.

28

1 **II. PROCEDURAL BACKGROUND**

2 **A. Settlement and Positive Class Reaction**

3 After several years of hard-fought litigation, Plaintiffs obtained a historic settlement for
 4 Class Members, providing \$85 million in cash, one of the largest privacy recoveries to consumers
 5 in history, as well as comprehensive reforms to one of the most popular apps in America. Now that
 6 Objectors have finally dismissed their appeals, Class Members who submitted Paid Subscription
 7 Claims are expected to receive 30% of the total amount paid for the Zoom app (an average of \$95),
 8 and those with User Claims (users who did not pay to use Zoom) are expected to receive an average
 9 of \$29.

10 Class Members overwhelmingly support the Settlement. More than 1.45 million Class
 11 Members submitted claim forms, while only five (5) objections were filed, of which two (2)
 12 complained about class action settlements generally. The three others are the subject of this motion.

13 **B. Rogers/Neace and Cohen Assert Extensive Objections, All Rejected by the
 14 Court**

15 Objectors Rogers/Neace and Cohen objected to various aspects of the Settlement, including
 16 the proposed class definition, plan of distribution, language of the notice, claim process, and even
 17 the size of the envelopes of the mailed checks.

18 The objection filed by Rodgers/Neace (Dkt. 228) included a laundry list of meritless
 19 criticisms, including: (1) unfair *pro hac vice* requirements; (2) unclear language in the class notice
 20 describing the release of “unknown claims”; (3) unfair documentation requirements showing that
 21 Class Members used, opened, or downloaded the Zoom Meeting Application; (4) the lack of a
 22 review process for denied claims; (5) improper distribution of unclaimed funds to Class Members,
 23 rather than to states through their escheatment rules; (6) the need for a form to update addresses on
 24 the settlement website, and (7) the need for procedural changes to the payment process, including
 25 that checks “be sent in a normal business (#10) envelope” and that Class Members have additional
 26 time to cash their checks. Dkt. 228.

27 Similarly, the objection filed by Cohen (Dkt. 227) called for the creation of a new “subclass”
 28 or “subset” of the Settlement Class composed of:

1 “All settlement class members who used Zoom video communications services as
 2 part of a business that was legally or contractually required to maintain client
 3 confidentiality as a part of services the business provided.”

4 According to Cohen, this “subclass” of Zoom users suffered unique harm that “qualitatively differs
 5 from the harms suffered by the larger group of class members” and required additional
 6 compensation. Cohen also proposed changes to the Plan of Distribution in order to “reapportion”
 7 additional funds to the subclass for their supposedly “unique” damages. Dkt. 227.

8 After considering the Rogers/Neace and Cohen Objections, the Court rejected them in their
 9 entirety, granted final approval of the Settlement Agreement, and entered final judgment. Dkt. 249-
 10 250.¹

11 **C. Rogers/Neace and Cohen Appeal, Then Agree to Settlements Providing Limited
 12 Benefits to the Settlement Class**

13 Less than one month after the Court granted final approval to the Settlement, Rodgers/Neace
 14 and Cohen filed separate Notices of Appeal. Dkt. 251-252. Notably, other than filing these two-
 15 page, form documents, and participating in a single phone call with the Ninth Circuit’s mediation
 16 coordinator, Objectors engaged in little other activity in the Ninth Circuit. Objectors never filed an
 17 appellate brief. Rather, after months of inactivity, Plaintiffs engaged Objectors regarding
 18 settlement and soon thereafter reached separate agreements providing limited relief addressing just
 19 portions of their respective objections.

20 The settlement with Rodgers/Neace provides that the Administrator will update the form
 21 used by class members to update their address and modify certain procedures to mail and deposit
 22 checks (for the limited number of Class Members who asked for physical checks rather than
 23 electronic payments). Dkt. 260-1 at 7. These procedural changes include mailing checks in
 24 “Number 10” business envelopes, providing more notice if checks are returned uncashed, and
 25 giving Settlement Class Members an additional 30 days to cash mailed checks. *Id.* While these
 26 procedures benefit the Class, they are limited in nature. Rodgers/Neace did not obtain any relief
 27 related to the lion’s share of their objections, including changes to *pro hac vice* requirements, the

28 ¹ In its Final Approval Order, the Court noted that the Rogers/Neace objections were also
 29 untimely, and both failed to show they were even Settlement Class Members. Dkt. 249 at 12.

1 Class Notice, the claim form and documentation requirements, the claim approval and review
 2 process, or distribution of unclaimed funds through state escheatment procedures.
 3

4 Similarly, the settlement with Cohen did not provide the primary relief sought in her
 5 objection, *i.e.*, the creation of a business “subclass” and reallocation of settlement funds to that
 6 subclass. Rather, Plaintiffs and Zoom merely agreed to a narrow “carve out” of the release to permit
 7 future claims against Zoom for indemnification or contribution in the event a state-licensed
 8 professional is sued based on Zoom’s failure to protect confidential information. Dkt. 260-1 at 15-
 9 16. Such a claim seems highly hypothetical, since Zoom denies any breach occurred, Cohen is
 10 unaware of any breach, and no claim or suit has ever been filed. In any event, this specific carve-
 11 out addresses one of Cohen’s objections, *i.e.*, that the Settlement Agreement did not account for the
 12 *risk* of possible lawsuits that might be filed against medical or other professionals in the future. *Id.*
 13 Cohen’s primary requests for relief were denied and unsuccessful.

14 **III. ARGUMENT**

15 **A. Legal Standard**

16 Any “payment or other consideration . . . provided in connection with . . . withdrawing an
 17 objection” to a class-action settlement must be approved by the court. Fed. R. Civ. P.
 18 23(e)(5)(B)(i).

19 Consideration provided to objector counsel can only be approved if the objector
 20 “substantially enhanced the benefits to the class under the settlement.” *Vizcaino, supra*, 290 F.3d
 21 at 1051-52. “The ‘substantial benefit’ need not be financial,” but if it is not, “the court must
 22 carefully scrutinize the benefits conferred” to determine whether they are more than “technical or
 23 coincidental.” *In re HP Inkjet Printer Litig.* No. 5:05-CV-3580 JF, 2011 WL 2462475, at *1 (N.D.
 24 Cal. June 20, 2011).

25 Fees for objector counsel should be evaluated based “on the same equitable principles as
 26 [fees for] class counsel.” *Rodriquez v. Disner*, 688 F.3d 645, 658 (9th Cir. 2012). Thus, “where
 27 objectors do not add any new legal argument or expertise,” or “do not participate constructively in
 28 the litigation,” no fees should be awarded. *Id.* at 659. The amount of any fee award is a matter for

1 a district court's discretion. *Id.* at 653.

2 Here, Objectors admit that they obtained only non-monetary benefits, and therefore seek an
 3 award under the lodestar method. To calculate the lodestar, a district court should "multiply the
 4 number of hours *reasonably spent in achieving the results obtained* by a reasonable hourly rate."
 5 *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1125 (9th Cir. 2002) (emphasis in original). Conversely,
 6 hours spent by objectors "in unsuccessful efforts unrelated to their success" should not be included.
 7 *Id.* It is not up to the district court to try to segregate the time devoted to successful efforts. Rather,
 8 objectors "bear the burden of submitting detailed time records justifying the hours claimed to have
 9 been expended" and a district court properly removes any hours that have not been proved to be
 10 reasonably expended. *Id.* at 1126 (objector's motion seeking "all the hours worked on the case . . .
 11 . patently [fell] short" of the requirements where objector only had limited success).

12 In the even an objector can establish a reasonable lodestar, a district court may then apply
 13 a negative or positive multiplier to adjust it downward or upward reflecting a host of
 14 "reasonableness" factors, including the quality of representation, benefits obtained, complexity of
 15 issues presented, and risk of non-payment. *In re Bluetooth headset Prods. Liab. Litig.*, 654 F.3d
 16 935, 942 (9th Cir. 2011). "Foremost among these considerations, however, is the benefit obtained
 17 for the class." *Id.*

18 Finally, payments to objectors themselves in connection with withdrawing an objection are
 19 evaluated in the same way as incentive awards for named plaintiffs. *In re Transpacific Passenger*
Air Transp. Antitrust Litig., No. C-07-05634 CRB, 2015 WL 4776946, at *2 (N.D.Cal. Aug. 13,
 20 2015). As with payments to objector counsel, the objector must have "substantially enhanced the
 21 benefits to the class under the settlement." *See Fraley v. Facebook, Inc.*, No. C 11-1726 RS, 2014
 22 WL 806072, at *1-2 (N.D. Cal. Feb. 27, 2014).

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1 **B. Application**

2 Objectors' motions for attorneys' fees and incentive awards fail to comply with virtually all
 3 of the legal prerequisites cited above.

4 First, Objectors fail to demonstrate that the relief provided in their settlements "substantially
 5 enhanced the benefits" provided to the Settlement Class. To the contrary, the relief provided by
 6 Rogers/Neace consists of limited, technical enhancements to the claims administration process
 7 relating to the narrow set of Class Members electing to receive their distributions by mailed checks
 8 (instead of electronically), including minor modifications to the website to update addresses, use
 9 of specific-sized envelopes, and 30 additional days to cash mailed checks. While beneficial to the
 10 Settlement Class, they do not amount to substantial enhancements that justify an award of
 11 attorneys' fees. Similarly, Cohen only obtained a narrow carve out to the release language, which
 12 will only come into play in the (unlikely) future event that professional Zoom users are sued by
 13 their clients for a breach of confidentiality relating to a Zoom meeting. Again, while the right to
 14 seek indemnification from Zoom is beneficial to some Class Members, the value is limited and not
 15 a "substantial enhancement."

16 Second, even if one assumed that the Objectors "substantially enhanced" the benefits to the
 17 Settlement Class, they both fail to establish their lodestar to obtain such benefits, as was their
 18 burden. Neither attempts to segregate their time, and instead both merely include *all of their time*
 19 *in this case*, including time spent pursuing meritless objections, appeals, and even filing their
 20 motion for attorneys' fees. Based on the law cited above, the Court should reject any time that was
 21 not reasonably expended for the benefits obtained.

22 Third, even if one assumed the Objectors "substantially enhanced" the benefits and properly
 23 segregated their time in their lodestar, the Court should discount that lodestar with a significant,
 24 negative multiplier given the relevant factors. Here, a downward adjustment is warranted given
 25 the limited benefits obtained for the Settlement Class, the questionable quality of representation
 26 (including filing late and improper objections), and the lack of complexity or novelty presented by
 27 the objections.

Finally, because the Objectors also failed to show how they substantially enhanced the benefits to the Settlement Class, they should not receive incentive awards. Indeed, only Cohen even bothered to submit a declaration and she failed to describe any efforts or time spent on this case, much less tied to the settlement relief. Rather, the Objectors' argument seems to be that because the Plaintiffs received incentive awards they should too. However, Plaintiffs devoted years to this action, pursuing claims, responding to extensive discovery, and assisting settlement discussions that resulted in a substantial monetary recovery for millions of Class Members. Conversely, it is unclear what any of the Objectors did in this case. Because they failed to support their request for an incentive award, it should be denied.

IV. CONCLUSION

The Court should not award attorneys' fees to Objectors' counsel or incentive awards to Objectors who did not substantially enhance the benefits to the Settlement Class. In the event the Court determines that awards are appropriate, they should be based on the limited nature of relief obtained for the Class and the minor amount of time spent to obtain such relief.

COTCHETT, PITRE & MCCARTHY, LLP

Dated: January 11, 2023

By: /s/ Mark Molumphy
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SIGNATURE ATTESTATION

I am the ECF User whose identification and password are being used to file the foregoing Memorandum in Opposition to Objectors' Motion for Fees and Incentive Awards. Pursuant to L.R. 5-1(i)(3) regarding signatures, I, Mark C. Molumphy attest that concurrence in the filing of this document has been obtained.

Dated: January 11, 2023

/s/ Mark C. Molumphy

Mark C. Molumphy